Supreme Court, U.S.
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No. _____

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In The
Supreme Court of the United States

EDDIE MCLEAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED

1. Did the Fourth Circuit Court of Appeals err in concluding that the Petitioner's rights under the 6th Amendment to the United States Constitution to either represent himself or to have his attorney of choice represent him had not been violated?

2. Did the Fourth Circuit Court of Appeals err in concluding that the sentencing enhancement in U.S.S.G. § 2K2.1(a)(2) was properly applied notwithstanding the decision in *United States v. Booker*?

3. Did the Fourth Circuit Court of Appeals err in concluding that it was proper to assign 3 criminal history points to each of the Petitioner's prior convictions for aggravated assault pursuant to U.S.S.G. § 4A1.1(a) where such convictions were the predicate convictions for enhancing the Petitioner's sentence pursuant to U.S.S.G. § 2K2.1(a)(2)?

4. Did the Fourth Circuit Court of Appeals err in not addressing the statutory error component of a *Blakely/Booker/Fanfan* claim of error, such that Petitioner is entitled to remand for imposition of a sentence under an advisory application of the guidelines?

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OPINION OF THE CASE BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is an unpublished opinion in *United States of America v. Eddie McLean*, case no. 02-4842. The decision is reported as *United States v. McLean*, 150 Fed. Appx. 249, 2005 WL 2857968 (4th Cir. 2005). A copy of the slip opinion is included in the appendix to this petition, at A-1.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment sought to be reviewed in this case is the decision of the United States Court of Appeals for the Fourth Circuit in case no. 02-4842, decided by unpublished opinion, dated October 12, 2005. *See* Appendix, at A-1.

The United States Supreme Court has jurisdiction to review this decision upon a writ of certiorari pursuant to 28 U.S.C. § 1254(1), which confers jurisdiction by writ of certiorari granted upon the petition of a party to a criminal case after rendition of a judgment in a court of appeals. This petition is filed pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States and addresses a decision of the United States Court of Appeals for the Fourth Circuit (1) in conflict with other decisions of the Fourth Circuit and of other United States courts of appeal and (2) which so far departed from the accepted and usual course of judicial proceedings, and which sanctioned such a departure by the district court, as to call for an

exercise of the supervisory power of the United States Supreme Court.

STATUTORY PROVISIONS INVOLVED

The questions presented in this case address certain United States Sentencing Guidelines sections and statutory provisions. U.S.S.G. § 4A1.1(a) assigns criminal history points for the Petitioner's two prior convictions for aggravated assault.

U.S.S.G. § 2K2.1 also applies and provides, in pertinent part, as follows:

> (a) Base Offense Level (Apply the Greatest):
>
> (1) **26**, if the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30), and the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense;
>
> (2) **24**, if the defendant committed any part of the instant offense subsequent sustaining at least two felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 2K2.1.

Finally, 18 U.S.C. § 3553(b)(1) states:

(b) Application of guidelines in imposing a sentence.-

> **(1) In general.-** Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into account by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines

> applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 U.S.C. § 3553(a)(1), (2) provides:

> **(a) Factors To Be Considered in Imposing a Sentence.-** The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider-
>
> > (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> >
> > (2) the need for the sentence imposed-
> >
> > > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> > >
> > > (B) to afford adequate deterrence to criminal conduct;
> > >
> > > (C) to protect the public from further crimes of the defendant; and
> > >
> > > (D) to provide the defendant with needed educational or vocational training, medical

> care, or other correctional treatment in the most effective manner.

The provisions of 18 U.S.C. § 3553 remain in full force and effect and are required to be considered by the court under the now advisory guidelines pursuant to *Booker*.

STATEMENT OF THE CASE

Petitioner, Eddie McLean, was charged with two (2) counts of Possession of a Firearm by a Felon in violation of 18 U.S.C. § 922(g). In the United States District Court for the Eastern District of North Carolina, a jury returned verdicts of guilty to both counts of Possession of a Firearm by a Felon. Petitioner was sentenced to an active term of imprisonment of 110 months on each count said sentences to run concurrently.

On appeal, Petitioner raised several evidentiary questions but also asserted that his sentence violated the principles set forth in *Blakely v. Washington*, 542 U.S. 296 (2004). Following the filing of his brief, the United States Supreme Court decided *Booker* effectively extending the principles of *Blakely* to the federal sentencing guidelines. The Fourth Circuit Court of Appeals rejected Petitioner's arguments by unpublished opinion filed on October 12, 2005. The Petitioner's Petition for Rehearing before the Fourth Circuit Court of Appeals was denied on November 29, 2005. *See* Appendix, at A-25.